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No. 564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE DURIRON COMPANY, INC., *Petitioner*

v.

CHARLES STEPHENSON, NORMAN BAKKE, ET AL.,
Respondents

REPLY BRIEF

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REPLY BRIEF

To The Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Durion Company, Inc., respectfully submits the following reply brief:

I. BUSINESS CONTACTS WITH THE STATE OF ALASKA

Respondents seek to persuade this Court that the Alaska Court was entitled to exercise *in personam* jurisdiction over petitioner either on the basis of petitioner's alleged business contacts with the State of

Alaska or simply because one of petitioner's products has allegedly caused injury in the forum State. As to the former contention, it would seem clear that under the standards established by the decisions of this Court, due process would be violated if the Alaska Court were permitted to exercise jurisdiction over petitioner in this case. Respondents, seeking nevertheless to make petitioner amenable to service of process regardless of the cause of action alleged, employ broad, conclusory statements which cannot be substantiated by the record. For example:

> Petitioner has denied that [it] . . . ever solicited business directly from Alaska. *The facts show, however, that Duriron did several acts that clearly shows its intention to do business in Alaska.* It is interesting to note that only one order was ever refused from any source . . . . [Resp. 11-12 (Emphasis added.)]

These "several acts" are never specified, and it stands unchallenged that petitioner was neither physically nor constructively in the State soliciting orders for its products. Moreover, the fact that petitioner did not refuse orders from the State is of no legal import due to the conclusive finding in the record that *not one order* resulted from solicitation by or on behalf of the petitioner. (App. 16a).

Finally, respondent follows the same path of the Alaska Supreme Court by attempting to bolster the decision on the ground that on January 1, 1963, petitioner expanded its sales district located in the Northwestern states to include Alaska. (Resp. 11). As explained in the petition for certiorari, however, the event is inconsequential since it occurred *after* the filing of the suit in question.

II. COMMISSION OF A TORTIOUS ACT WITHIN THE STATE

Petitioner must conclude that respondents are utilizing as an alternate basis of upholding jurisdiction, the "well settled" rule "that one who commits a tort in a state can be held responsible in that state . . . ." (Resp. 12). The particular cases cited,[1] relate to nonresident motorists who are deemed to have appointed an appropriate state official for purposes of substituted service in actions growing out of accidents occurring while a vehicle is in operation *within a forum State.* Mr. Justice Goldberg recently dealt with the jurisdiction of New York over an out-of-state defendant who allegedly committed a tort while *physically present* in that State:

> If it is fair in a due process sense to subject a transient motorist to *in personam* jurisdiction on the basis of a single negligent tort, *Hess* v. *Pawloski,* 274 U.S. 352, surely it is equally fair to hold a person like appellant, who, it is alleged, *intentionally* entered a State for the purpose of committing a tort therein, personally responsible in the courts of that State. *The . . . cases which have questioned the application of "long arm" statutes*[2] *in particular situations have differed from this*

[1] *Young* v. *Masci,* 289 U.S. 253 (1933); *Hess* v. *Pawloski,* 274 U.S. 352 (1927).

[2] Referred to are those statutes utilizing language such as "commission of a tort in whole or in part" within the forum state. See Petn. 15. Of interest in the instant case is the fact that the statute in play, Section 10.05.642 of the Alaska Statutes, is applicable only to corporations "doing business" within the State. Since the case is one of first instance in Alaska, petitioner had no warning of the broad interpretation which would be given to justify service of process. Of course, no argument can be made on this issue due to binding precedent which denies this Court the right to review state court decisions interpreting local law.

one in two important respects: the foreign defendant was never physically present in the forum State, and the tortious act there was unintentional. [*Rosenblatt* v. *American Cynamid Co.*, 86 S.Ct. 1, 4 (1965) (Mr. Justice Goldberg, In Chambers) (Emphasis added.)]

Respondents cite *Singer* v. *Walker*, 250 N.Y.S.2d 216 (App. Div. 1964), to suggest that the "line of authorities" supporting jurisdiction in actions relating to tortious acts "committed within a State" is so well settled as not to be subject to review by this Court. (Resp. 14). This interim decision held that mere circulation of a product which is misleadingly labeled is a sufficient "contact" with a State to justify an assertion of jurisdiction over the foreign manufacturer—even though injury occurs elsewhere. However, on appeal, the rationale relied upon by respondent was rejected, the New York Court of Appeals holding that although the service of process statute was phrased in "long arm" terminology, tortious activity—without a showing of corporate presence *in the State*—was an insufficient ground upon which to justify service of process. 261 N.Y.S.2d 2 (Ct. App. 1965). The decision was affirmed, however, because the record furnished plenary evidence of *active solicitation* by agents of the corporation located *in the State*.[3]

Respondents further state that Alaska is the most appropriate forum for trial and that this is a factor in determining due process requirements, *i.e.*, that there is now such a doctrine as *forum conveniens*. This

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[3] Certiorari was denied by this Court on November 8, No. 473, 1965 Term.

completely disregards *Hanson* v. *Denckla*, 357 U.S. 235, 254 (1958), which enunciates the proposition that jurisdiction is not acquired by being the "center of gravity" of a controversy. Mr. Justice Goldberg reaffirmed this conception in his *Rosenblatt* decision, where appellant had contended that the courts of New York did not have jurisdiction since all the witnesses, etc., were located in Italy. In answer, the Justice stated:

> These facts are not relevant, however, to the *jurisdiction* of New York which is plainly supportable, as far as due process is concerned, on appellant's conduct within New York. They relate only to questions of convenience and not to jurisdiction in a constitutional sense. [86 S.Ct. at 4]

III. IMPORTANCE OF THE QUESTION PRESENTED

Respondents conclude that the "only serious attempt to portray" a conflict is the litigation occurring in the District Court of Minnesota (Resp. 17), and further state that the case of *Aftanase* v. *Economy Baler Co.*, 343 F.2d 187 (C.A. 8 1965), settles this conflict. Petitioner respectfully suggests that language extensively quoted from that decision must necessarily be viewed in the light of Judge Blackmun's introductory statement that the court was not confronted with a situation

> where an isolated offending product is the only contact between the defendant and the forum state. *And we thus are not propelled into the very center of the controversial area of pure single act interstate situations where courts, on the constitutional issues, appear still to reach varying results.* [343 F.2d at 189 (Emphasis added.)]

The area of controversy in the Minnesota District Court, of course, centers around the question whether

the due process clause permits exertion of jurisdiction over a foreign corporation on the basis that one of its products causes injury in the forum State.[4] Compare *Pendzimas* v. *Eastern Metal Prods. Corp.*, 218 F. Supp. 524 (D. Minn. 1961) with *Williams* v. *Connolly*, 227 F. Supp. 539 (D. Minn. 1964). The Eighth Circuit decision, therefore, has no bearing on the legal issues involved; it being merely another in the long line of cases utilizing active solicitation *in a forum State* as a basis for the exertion of jurisdictional power. The same holds true for *Blount* v. *Peerless Chemicals, Inc.*, 316 F.2d 695 (C.A. 2, 1963), also relied upon by Respondents. (Resp. 16).

IV. CONCLUSION

Petitioner is a small Ohio corporation which, during the period in question, engaged in no affirmative or intentional activity related to promoting the sales of its products in Alaska. Petitioner pointed out to the courts below: (1) that it had sales districts in which it employed salesmen to promote its products; (2) that the State of Alaska (during the period in question) was not included in any of these units; (3) that at no time had any individual entered that State for the purpose of soliciting sales for any of its products; (4) that one company, John T. Doherty & Associates located in Seattle, Washington, acting as an independent manufacturers' representative and on its own initiative, had forwarded some unknown quantity of catalogs under its own name to interested persons, *i.e.*,

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[4] That a nationwide conflict is prevalent in this area was also noted by Mr. Justice Goldberg in his *Rosenblatt* decision. 86 S.Ct. at 4, n. 9.

those previously expressing an interest, in the State; and (5) that during the five years preceding the controversy total sales resulting in products reaching the State by direct and indirect means were measured in ten thousandths of one per cent.

Nevertheless, the Alaska Supreme Court held that petitioner "purposefully availed" itself of the benefits and protections of the laws of that State and that its sales therein were "substantial."[5] Moreover, petitioner has been told that

> it is not unreasonable where a cause of action arises from alleged defects in [petitioner's] product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here. [App. at 11a]

It is respectfully submitted that there is no justification for such a holding in any decision of this Court. The conflicting decisions from State and federal courts[6] emphasize the importance of this Court's review.

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[5] Of interest are the numerous cases involving publishers of magazines and newspapers. The circuits are substantially in accord that "the mere circulation of a periodical through the mails to subscribers and independent distributors constitutes neither doing business nor engaging in business activity." *Buckley* v. *New York Times*, 338 F.2d 470, 473 (C.A. 5, 1964). Therefore, although there may be "substantial" sales there can be no exertion of jurisdictional power unless corporate presence is shown, *e.g.*, offices located within the State which are a participating unit in the corporate complex. Petitioner chooses not to correlate these decisions at this time, however, due to the First Amendment issues involved.

[6] Petitioner's list of cases since *Hanson* on this issue now has reached a total in excess of one hundred and fifty.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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